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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHAD MICHAEL SMOKE,

Petitioner,

v.

RICK COURSEY,

Respondent.

Civ. No. 08-1413-CL

OPINION AND ORDER

PANNER, District Judge:

Magistrate Judge Mark D. Clarke filed a Report and Recommendation ("R and R") [#26], and the matter is now before this court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Petitioner timely filed objections [#31] to the R & R. Accordingly, I have reviewed the file of this case *de novo*. See 28 U.S.C. § 636(b)(1)(c); McDonnell Douglas Corp. v. Commodore

Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). I conclude the R & R is correct.

Petitioner raises two specific objections to the R & R. First, petitioner argues that Judge Clarke and the Oregon courts misconstrued his claim regarding ineffective assistance of counsel (Objections to Magistrate Judge's Findings and Recommendation, 1-4.) Upon *de novo* review, I agree with Judge Clarke's conclusion that the alleged lack of investigation by petitioner's trial attorney was actually reasonable and "sound trial strategy" as the issue of why petitioner's car was at the victim's house was a collateral issue and not relevant to petitioner's defense. (Report and Recommendation, 8-10.)

Additionally, Judge Clarke correctly found that even if the trial court allowed witnesses to testify that Mr. Salladay stole petitioner's vehicle, there was not a reasonable probability that the jury would have acquitted petitioner because any such testimony would have conflicted with petitioner's own statements to police and because the evidence against petitioner was overwhelming. (Report and Recommendation, 10-11.) Therefore, petitioner cannot demonstrate prejudice under Strickland v. Washington, 466 U.S. 668, 694 (1984). (Report and Recommendation, 10-11.)

Petitioner's second objection is that the denial of a certificate of appealability is premature as petitioner has yet to decide whether or not to undertake an appeal. This objection is foreclosed by Rule 11(a) of the Rules Governing Section 2254 Cases

In The United States District Courts. ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.")

CONCLUSION

Magistrate Judge Clarke's Report and Recommendation (#26) is adopted. The petition (#1) is denied and this action is dismissed. Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is DENIED. See 28 U.S.C. § 2253(2).

IT IS SO ORDERED.

DATED this 13 day of May, 2010.

A handwritten signature in black ink, reading "Owen M. Panner", is written over a horizontal line.

OWEN M. PANNER
U.S. DISTRICT JUDGE